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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JASON WEST, Defendant and Appellant.	A157163 (Alameda County Super. Ct. No. 152985C)

In 2007, defendant Jason West was convicted of first-degree murder committed during the course of an attempted carjacking and sentenced to life without possibility of parole. In 2018, the Governor signed Senate Bill No. 1437 (2017–2018 Reg. Sess.) (Stats. 2018, ch. 1015) (SB 1437), which narrowed the definition of felony murder and provided a procedure whereby defendants whose crimes did not fall within the narrowed definition could petition for resentencing. West filed such a petition, and the trial court denied it in a written opinion. West argues that the trial court erred in denying the petition, and in doing so without first appointing counsel to represent him. We affirm.

BACKGROUND

In 2007, West was convicted, together with Ishmael Johnson and Terrell Watson, of the first-degree murder of Lamar Whitehead

(Pen. Code, § 187),[1] committed in the course of an attempted carjacking (§ 190.2, subd. (a)(17)(L)), and, together with Watson, of the attempted murder of Keith Griffin (§§ 664, 187).[2] In 2010, this court affirmed his conviction. (*People v. Johnson* (June 14, 2010, A121366) [nonpub. opn.] (*Johnson*).) Our opinion summarized certain facts of the offense, as shown by the evidence at trial, as follows:

"Keith Griffin testified that he and his long-time friend, Lamar Whitehead, the murder victim, were interested in modifying and accessorizing their cars. Griffin equipped a Chevrolet Monte Carlo with elaborate 20-inch chrome wheel rims that cost about $1,400. These rims could not simply be popped off with a crowbar; they could only be removed after jacking up the car and unscrewing a number of lug nuts. He estimated that it would take 'about 15 minutes' to remove the rims from his car, 'plus you got to get through the lock nuts.' Therefore, he testified, if someone was going to steal his rims, they would have to take his whole car to do it.

"Griffin worked in San Leandro and Whitehead, 21 years old at the time of his death, worked a graveyard shift in Oakland starting at 11:00 p.m. Griffin was often asked by Whitehead for a ride to work, and drove his car to Whitehead's residence at least 100 times after installing the rims. At 10:45 p.m. on January 27, 2005, Griffin drove his Monte Carlo to Whitehead's residence again, located in an apartment complex at 3901 Webster Street in Oakland, to give Griffin a ride to work again, arriving there at 10:51 p.m.

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[1] Subsequent undesignated statutory references are to the Penal Code.

[2] The jury also found true various firearm enhancements, including that West personally and intentionally discharged a firearm causing death to Lamar Whitehead, and great bodily injury to Keith Griffin (§ 12022.7, subd. (a); § 12022.53, subd. (d)).

The apartment complex consisted of three apartment buildings, with a parking lot serving all three, for which there was only one entrance/exit.

"As Griffin pulled into the complex parking lot, he saw a group of about five men and women standing on the sidewalk, and a group of about three young men standing across the street near a battered, brown Buick Skylark. He stopped at the far end of the parking lot and called Whitehead, who came out of his apartment and entered the car. As Griffin started to back up, he heard a noise which, according to his testimony, sounded 'like somebody balled up their fist and . . . gave like two knocks on the side of the car, like "Stop." ' Griffin put on his brakes. He saw a man 'walking around the back of the car. They came up the driver's side, and they walked all the way up. . . . I rolled the window down, and I was like "Ah, my bad." ' The man walked toward the front of the car, turned around, and asked, 'What did you say?' He then opened the driver's side door, reached into his waistband and said, 'Nigger, check this out.' Griffin testified that he assumed the man, who looked like defendant Watson, was reaching for a gun.

"Griffin pulled the car door shut and 'just hit the gas.' As he backed into the gate of the parking lot entrance, he heard a gunshot, which did not hit any of his car's windows. The man was standing in the middle of the parking lot pointing a black revolver, which Griffin thought was probably .38 caliber, straight at Griffin's head from 20 to 25 feet away. Griffin testified, 'I threw the car in drive, and I punched the gas, and I tried to run him over, and he jumped over to the side in between some parked cars and I ran into a car.' As Griffin shifted in reverse, he saw a flash, his driver's side window shattered, and he felt something land on his arm.

"Griffin 'hit the gas to go backwards.' He steered through the parking lot gate and turned onto the street, where the crowd had grown bigger. A

man standing next to a rock quickly pointed a gun at Griffin's vehicle and fired, shattering the passenger-side window, and, Griffin thought, hitting Whitehead, who slumped over and made a gurgling sound, as if he was choking. Griffin could not describe this shooter, other than to say he was calm. In his first two statements to police, Griffin thought it was the same person who shot at him in the parking lot, but at trial he testified that he thought there were two shooters. Griffin ducked down, shifted gears, and 'punched the gas.' He ran into the back of a parked truck, but pushed it out of the way, and drove off. He heard more shots, but did not see where they came from.

"As Griffin drove home, he called 911 and asked for an ambulance, which arrived within a minute of his arrival at his house. Griffin was eventually taken to the hospital. A gunshot had entered his body under his armpit and come out at the top of his arm.

"Whitehead was killed. The parties stipulated that he died from a bullet wound to the chest. It passed through his left arm, then penetrated his left lung, pericardial sac, heart, liver, and right lung, exiting into his right chest wall. Two bullet fragments were taken from Whitehead's body, one was found on his jacket, and another was found on the back floorboard of Griffin's car." (*Johnson*, *supra*, at pp. 3–8.)

Our opinion also described the testimony of E.L., a witness who was a minor at the time of the shooting:

"According to E.L.'s trial testimony, Watson opened the passenger side door of his car, reached across E.L., and pulled out a black gun. He also put on a 'hoodie' and a leather jacket. Watson and Johnson walked across the street together, and Watson entered the parking lot while Johnson stood by the parking lot gate. West remained behind Watson's vehicle.

"Within two to three minutes, E.L. saw a 'big light flash' and heard gunshots coming from the parking lot. She testified, 'I heard a big crash . . . like, it was a big car accident, and then all of a sudden I seen a car spinning, and he like hit all the cars trying to come out the parking lot. He hit about like four cars coming out of the parking lot. And when he was like by the fence where [Johnson] was at, that's when [Johnson] hollered, "Shoot. Shoot." The very next thing that happened was after he said, "Shoot. Shoot." all the other guys just—I turned around. All the other guys just start pulling out guns and just started shooting every which way.' West stood in the middle of the street and fired a silver gun twice at the car. About three others also fired guns." (*Johnson*, *supra*, at pp. 9–11.)

And we described the testimony of M.P., also a minor at the time of the shooting, regarding her interview with the police:

"M.P. renounced the incriminating information about defendants she told to police in her interview, testifying that none of what she said was true. This included that she saw 'the end' of Whitehead getting shot, opened her door and saw Whitehead's friend's car crashing, looked outside after the shooting and saw Watson running away with a gun in his hand, saw West fire two shots with a gun from across the street at a car driving away with Whitehead inside, saw that West's gun 'broke,' saw Watson shoot his gun when Johnson yelled, 'Shoot, shoot,' saw the car crash into another car on Webster Street, saw 'heck of boys' running when the car crashed, and saw, that, as the car went towards 38th Street, Johnson, West and Watson together, ran in the opposite direction, towards 40th Street, with Watson and West holding guns in their hands. M.P. said she lied to the police, did not know why she lied, and was nervous, scared, and under pressure at the time." (*Johnson*, *supra*, at p. 13.)

West was sentenced to seven years for the attempted murder, a consecutive term of life without parole for the murder, and two consecutive terms of 25 years to life for the firearm enhancements under section 12022.53, subdivision (d).[3]

Senate Bill 1437 and West's Petition for Resentencing

SB 1437, which took effect on January 1, 2019, limits first degree felony murder liability to three categories of defendants: (1) "the actual killer"; (2) a defendant who "was not the actual killer, but, with the intent to kill," aided and abetted the actual killer; or (3) a defendant who "was a major participant in the underlying felony and acted with reckless indifference to human life." (§ 189, subd. (e), as amended by Stats. 2018, ch. 1015, § 3, p. 92.) SB 1437 also provides that a defendant convicted of felony murder may petition the sentencing court to have his or her conviction vacated if the following three conditions are satisfied:

"(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine.

"(2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder.

"(3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019." (§ 1170.95, subd. (a), added by Stats. 2018, ch. 1015, § 4, p. 830.)

After such a petition is filed, SB 1437 provides: "The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner

[3] The remaining firearm enhancements were imposed and stayed.

has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. These deadlines shall be extended for good cause. If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause." (§ 1170.95, subd. (c), added by Stats. 2018, ch. 1015, § 4, p. 830.) After issuing an order to show cause, the court must then hold an evidentiary hearing to determine whether the petitioner is entitled to relief. (§ 1170.95, subd. (d), added by Stats. 2018, ch. 1015, § 4, p. 830.)

On March 20, 2019, acting in propria persona, West filed a handwritten petition for resentencing under SB 1437. The petition asserted a variety of arguments, including that certain statutes and jury instructions were unconstitutionally vague, and, as will be discussed, a few brief references to SB 1437. The petition also attached several exhibits: the abstract of judgment (exhibit A); a reporter's transcript of the return of the jury's verdict and sentencing hearing (exhibit B); copies of the jury instructions on murder, felony murder, and aiding and abetting (exhibit C); the jury's verdict (exhibit D); a Senate Committee Analysis of Senate Bill No. 261 relating to youth offender parole (exhibit E); the jury instructions on the carjacking special circumstance (exhibit F); and the jury instructions on first degree murder (exhibit G).

On March 26, without appointing counsel and before receiving a response from the government, the trial court denied the petition in a 15-page written order. After recounting the procedural background and the facts of the offense as drawn from our opinion on appeal, the order denying the petition concluded as follows:

"The Petition is denied because relief under section 1170.95 is unavailable to Petitioner. As provided in Petitioner's direct appeal, there was substantial evidence that Petitioner intended to engage in the carjacking of Griffin's vehicle. As provided in that opinion, there was a significant amount of substantial evidence, largely contained in E.L.'s and/or M.P.'s testimony, that the defendants planned to take control of Griffin's car and steal the rims. Griffin testified that he had driven his rim-accessoried Monte Carlo to the apartment complex at least 100 times, and often gave Whitehead a ride to his job, which started at 11:00 p.m. Watson and Petitioner frequented the apartment complex, and Johnson lived there. Johnson was heard talking to Watson and Petitioner about waiting for someone to bring him some rims on the day of the shooting. The three were seen leaving and returning to the area of the apartment complex together, where they waited outside for at least one-half hour. When Griffin drove up in his Monte Carlo, Johnson was heard to say, 'That's him right there. That's him. There he go.' Watson was seen immediately retrieving a gun from his car, putting on a hoodie, and walking across the street to the complex's parking lot with Johnson, while Petitioner stayed behind Watson's car. Subsequent events indicate Watson and Petitioner were each armed with a loaded weapon. Watson then followed Griffin's car into the parking lot. Petitioner, already armed, remained across the street from the apartment complex, and Johnson positioned himself by the parking lot gate, somewhere between Watson and Petitioner. After Whitehead got in the car, Watson approached, manufactured a confrontation with Griffin, opened the driver's side door, and showed Griffin his weapon. Griffin's testimony indicated that when he resisted Watson's intimidation, Watson did not hesitate to shoot at him—*before* Griffin tried to run him over, indicating the willingness to use weapons fire to carjack Griffin's car. When

Griffin continued his efforts to escape, Johnson promptly yelled to shoot and Petitioner promptly did so, stopping only because his gun broke. It was only after Griffin escaped that they ran away.

"As the Court of Appeal pointed out, the jury could reasonably infer from defendants' positioning (with Petitioner outside the complex and Johnson by the parking lot gate) and Watson's opening of the driver's side door, that they planned all along for Watson to jump into the driver's seat after intimidating or forcing Griffin and Whitehead to give up the car, pick up Johnson and Petitioner, and drive away. Additionally, substantial evidence presented at trial indicated that Watson and Petitioner fired multiple times a[t] the car within moments of each other, that either could have been the proximate cause of the injuries, and that it was not possible to determine who shot Griffin or Whitehead. Furthermore, there was no evidence presented at trial that Petitioner had any 'sudden quarrel' with Griffin or Whitehead, that they said or did anything sufficient to provoke an ordinarily reasonable person to deadly violence, or that Petitioner acted under the heat of passion. Similarly, there was not substantial evidence that Petitioner believed himself or anyone else to be in imminent danger of death or great bodily harm when he shot at the Monte Carlo. There was no evidence that Griffin attempted to do any harm to Petitioner when he drove out of the parking lot. There was no substantial evidence that Petitioner acted in response to anything other than Johnson's shout to shoot.

"Accordingly, Petitioner was either the actual killer or, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murders in the first degree, or was a major participant in the underlying felony and acted with reckless indifference to human life, given the true finding on the special circumstance

allegation. (§§ 189, subd. (e); 190.2, subds. (c), (d).) Additionally, Petitioner was not convicted of murder under the natural and probable consequences doctrine. Rather, Petitioner was convicted on a valid theory of murder which survives the changes to sections 188 and 189 made by SB 1437. (§ 1170.95, subd. (a)(3).)"

West timely appeals.

DISCUSSION

West argues that the trial court erred in concluding that he had not made a prima facie showing that he is entitled to relief under SB 1437, both because it should have credited his petition's assertion that the requirements of the statute were satisfied and because it should not have looked beyond the allegations of the petition to the facts as described in our opinion on appeal.[4] And he argues that the trial court did not follow the statutory procedure because it should have appointed counsel before ruling on his petition.

The Trial Court Did Not Err in Concluding the Petition Does Not Establish a Prima Facie Case

We do not agree that the trial court erred in concluding that West's petition failed to establish a prima facie case that he was entitled to relief under SB 1437.

As noted, West's petition briefly makes a wide range of arguments, including that various statutes and jury instructions are unconstitutionally vague, that he lacked the mental capacity to understand the consequences of actions because of his youth, and that he should be resentenced under Senate Bill No. 620 (2017–2018 Reg. Sess.), granting the trial court discretion to strike certain firearm enhancements in interest of justice. The only arguments in the petition that arguably relate to SB 1437 are a few conclusory statements, including that West was not the "actual killer and no

[4] On appeal, we ordered counsel appointed for West.

evidence exist[s] to satisfy Pen[al] Code [section] 190.2 subd[ivision], (d) conduct requirement of a major participant," that West's "personal involvement was not substantial," and that his "aiding and abetting sentence warrants retroactive resentencing under *People v. Chiu* (2014) 59 Cal.4th 155, and newly enacted Senate Bill [No.] 1437." The petition does not provide or discuss the facts of the offense or any of the evidence at trial, nor does it offer any argument or explanation why West does not fit into the three categories of defendants who can still be convicted of felony murder after the passage of SB 1437.

Nor does West's appointed counsel offer any such argument on appeal. Again, his brief does not discuss the facts of the offense or the evidence at trial, and it does not explain why West does not fit into any of the three categories of defendants who can be convicted of felony murder after the passage of SB 1437. Instead, his brief simply states, in relevant part, that "Mr. West's petition asserted under penalty of perjury that . . . [h]e could not be convicted of first- or second-degree murder because of changes made to section 188 made effective January 1, 2019."[5] West then argues that this assertion was sufficient to establish a prima facie case and that the trial court "exceeded its statutory authority" by going on to consider the evidence at trial. We are not persuaded.

Whatever a prima facie showing under section 1170.95, subdivision (c) requires, it certainly requires more than the conclusory assertion that the requirements of the statute have been satisfied—in particular, it requires evidence. (See *People v. Verdugo* (Jan. 15, 2020, B296630) __ Cal.App.5th __

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[5] For this proposition, West cites three pages of the petition, but those pages do not contain this assertion. At best, as noted, they assert that "Petitioners aiding and abetting sentence warrants retro active resentencing under . . . newly inacted [*sic*] Senate Bill [No.] 1437."

[pp. 11–13]; Black's Law Dict. (11th ed. 2019) p. 1141, col. 2 ["prima facie case" defined as "[a] party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor"]; *People v. Johnson* (2015) 242 Cal.App.4th 1155, 1163 ["Normally, however, a 'prima facie showing' connotes an evidentiary showing that is made without regard to credibility"]; *ibid*. at p. 1163 ["A 'prima facie' showing refers to those facts which will sustain a favorable decision if the evidence submitted in support of the allegations by the petitioner is credited"].)

And it is not clear how any such showing could have been made. Even assuming that West was not the actual killer and did not have the intent to kill, he did not qualify for resentencing if he "was a major participant in the underlying felony and acted with reckless indifference to human life." (§ 189, subd. (e).) In finding the special circumstance true, the jury necessarily concluded either that West had the intent to kill, or that all of the following were true: "1. The defendant's participation in the crime began before or during the killing; [¶] 2. The defendant was a major participant in the crime; [¶] AND 3. When the defendant participated in the crime, he acted with reckless indifference to human life." (See CALCRIM No. 703.) As the trial court discussed, the evidence showed that West participated in the carjacking and that he fired at least two shots at Griffin's occupied vehicle, amply demonstrating reckless indifference to human life. And in our opinion on direct appeal, we concluded that the true finding on the special circumstance allegation was supported by substantial evidence. (*People v. Johnson*, *supra* A121366.) West has not offered any argument or alleged any facts to address any of this, either below or with the benefit of appointed counsel on appeal. Under these circumstances, he has failed to make a prima facie case that he is entitled to resentencing.

West also argues that the trial court erred in looking beyond the face of the petition and relying on the summary of the facts contained in our opinion. But section 1170.95, subdivision (d)(3) provides that at the hearing to be held once the petitioner has made a prima facie case, "[t]he prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens." And our opinion, which summarized certain of the evidence at trial, was a part of the record of conviction. (See *People v. Woodell* (1998) 17 Cal.4th 448, 450–451, 456 [appellate court opinion is part of record of conviction for determining whether prior conviction qualifies as serious felony]; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 800 [unpublished opinion by Court of Appeal "is sufficient evidence of the record of conviction" for resentencing petition under § 1170.126].) Given that the parties could rely on the record of conviction at such a hearing, we see no reason why the trial court should be barred from relying on the record of conviction at the prima facie stage—at least where, as here, West has not disputed the facts contained in our opinion or explained how it misstates the evidence. (See *People v. Verdugo*, *supra*, __ Cal.App.5th __ [pp. 3, 13, 19] [proper for trial court to consider opinion in direct appeal as part of the record of conviction in evaluating § 1170.95 petition at prima facie stage]; *People v. Lewis* (2020) 43 Cal.App.5th 1128, 1138 [same].)

Any Error in Ruling on the Petition Before Appointing Counsel Was Harmless

West also argues that the trial court erred in ruling on his petition without first appointing counsel to represent him. West asserts that the failure to appoint counsel violated section 1170.95, subdivision (c), as well as the requirements of due process and the Sixth Amendment.

We need not address the merits of these arguments, because under the circumstances of this case, any failure to appoint counsel was clearly

harmless beyond a reasonable doubt.[6] The parties do not dispute that had the trial court determined that West had made the required prima facie showing, it would have then been required to appoint counsel for him. (See § 1170.95, subd. (c).) West's argument is thus that after receiving his petition, the trial court should have appointed counsel and deferred ruling on the petition until the government had filed a response, and West—with the assistance of counsel—a reply. But West has not offered any explanation for how the assistance of counsel in drafting a reply brief could have produced a different result. As discussed at length above, West's petition failed to establish a prima facie case that he was eligible for relief.[7] And even with the benefit of counsel appointed to represent him in this appeal, West has not explained how he meets the requirements for resentencing under the statute. Under these circumstances, the trial court's failure to appoint counsel for West after receiving his petition was harmless beyond a reasonable doubt. (See *People v. Cornelius* (2020) 44 Cal.App.5th 54, 58 [rejecting contention that trial court erred in ruling on § 1170.95 petition before appointing counsel where petitioner was "indisputably ineligible for relief"].)

DISPOSITION

The order denying the petition is affirmed.

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[6] At least two courts have held that the duty to appoint counsel under section 1170.95, subdivision (c) does not arise until after the court determines that the petitioner has made the required prima facie showing. (See *People v. Verdugo*, *supra*, __ Cal.App.5th__ [pp. 17–18]; *People v. Lewis*, *supra*, 43 Cal.App.5th at pp. 13–15].)

[7] Given this, we need not address West's argument that the trial court "short-circuited" his right to a hearing on the merits of his petition. The statutory right to an evidentiary hearing on the merits requires an order to show cause, which in turn requires a prima facie showing that the petitioner is entitled to relief. (See § 1170.95, subds. (c) & (d).)

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Richman, Acting P.J.

We concur:

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Stewart, J.

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Miller, J.

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